

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 July 1995

relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/33.802
— BASF Lacke + Farben AG, and Accinauto SA)

(Only the French and German texts are authentic)

(95/477/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 15 (2) thereof,

Having regard to the Commission Decision of 12 May 1993 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has objected, in accordance with Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. Subject

- (1) The subject of this Decision is the restrictions of competition that resulted from the fact that BASF Lacke + Farben AG (BASF L + F) contractually required Accinauto SA (Accinauto), the exclusive distributor of Glasurit motor vehicle refinishing paints in Belgium and Luxembourg, 'to pass on to BASF L + F any customer inquiries coming from outside the contract territory'.

B. The parties

- (2) BASF L + F is a wholly-owned German subsidiary of BASF AG, Ludwigshafen (the parent company of the BASF chemicals group) and has its registered office in Münster-Hiltrup. In 1991, BASF L + F had a turnover of DM 1 668 million, of which DM 314 million was accounted for by worldwide sales of motor vehicle refinishing paints and DM 243 million by sales of motor vehicle refinishing paints within the Community.
- (3) Accinauto, whose registered office is in Brussels, has since 1937 been the BASF group's authorized dealer in motor vehicle refinishing paints in Belgium and Luxembourg and, since 1974, the exclusive distributor of Glasurit products. Its turnover in the tax year 1991 was Bfrs 738 million, some 85 % of which was accounted for by BASF products. The company is managed by Messrs Pierre and Claude Dudouet, Managing Directors.
- In 1982, the two Managing Directors established the firm Technipaint (with the same registered office as Accinauto) for the technical training of sellers of Glasurit products.
- (4) BASF Coating and Inks Limited (BASF C&I) is a wholly owned subsidiary of the BASF group and is its marketing company for motor vehicle refinishing paints in the United Kingdom and Ireland. In 1991, BASF C&I had a turnover of £ 80 million, of which £ [...] ⁽³⁾ million was accounted for by Glasurit products.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽³⁾ '[...]' In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 (2) of Regulation No 17 concerning non-disclosure of business secrets.

BASF C&I distributes motor vehicle refinishing paints under the 'Glasurit' and 'RM' (Rinshead Mason) trade names.

- (5) Calbrook Cars Limited (Calbrook) is a motor vehicle body repair business based in London. It :
- (a) sells special-effect paints manufactured by the United States company Metalflake Inc.;
 - (b) is an authorized outlet for Sikkens paints manufactured by Akzo;
 - (c) has since 1983 been a (parallel) importer of Glasurit products.

In 1991, Calbrook had a turnover of £ 3,2 million, of which [...] was accounted for by sales of Glasurit products.

- (6) Ilkeston Motor Factors Limited (IMF), which was incorporated in 1978 and is based in Derbyshire, United Kingdom, is a distributor of motor vehicle refinishing products. In the financial year ending on 29 February 1992, it had a turnover of £ 777 242, of which [...] was accounted for by sales of Glasurit products.

C. The proceeding

- (7) This proceeding was initiated in response to a complaint lodged with the Commission on 28 January 1991 by IMF and Calbrook against BASF L + F and Accinauto. IMF and Calbrook alleged in their complaint that Accinauto, from which both complainants (IMF directly and Calbrook via IMF) purchased Glasurit motor vehicle refinishing paints, had stopped supplying them in the summer of 1990 at the instigation of BASF L + F.
- (8) On 26 June 1991, in response to the complaint, the Commission carried out investigations on the business premises of BASF L + F, BASF C&I, Accinauto and Technipaint. Requests for information pursuant to Article 11 of Regulation No 17 were also sent to obtain further clarification of the facts. On 12 May 1993, the Commission sent statements of objections to BASF L + F and Accinauto. On 23 September 1993, a hearing was held in the case.

D. The product

- (9) This Decision relates to motor vehicle refinishing paints, which are used mainly in the following situations :
- (a) warranty work : in the case of 'new vehicles' which were damaged in transit or which, upon delivery, reveal paint damage that had not been detected by the manufacturer's quality control ;
 - (b) repainting of used cars ;
 - (c) accident damage : refinishing of minor and major damage ;

(d) commercial vehicles : painting of logos on new bodywork and paintwork touch-ups.

- (10) Resprays of used vehicles require a board range of the following products :
- fillers and primers,
 - top coats and lacquers,
 - additives and activators,
 - hardeners,
 - solvents.

E. The United Kingdom market

(i) Overall situation

- (11) A feature of the United Kingdom market is that, compared with the continental European countries, it was relatively late in introducing the so-called 'new technology' motor vehicle refinishing paints. These are two-pack paints which are gradually replacing the 'old technology' products. Old technology products are either nitrocellulose-based products or synthetic acrylic paints. They can be used under relatively simple conditions with little expenditure on materials, but the refinishing process takes much longer. Two-pack paints are acrylic based and have to be mixed with an isocyanate hardener before use. The advantages of this process are greater durability and much quicker drying. On the other hand, to be able to use two-pack paints, body repair shops have to invest heavily in spray booths and drying units.

According to information provided by BASF L + F, the use of two-pack paints also requires substantial investment by the manufacturer, since the body shops must be provided with mixing machines (usually free of charge) to help them mix the required paint colour using the various components and mixing colours.

- (12) Apart from two slight increases in 1981 and 1985, the total volume of motor vehicle refinishing paints used in the United Kingdom has been falling steadily.

The main reasons for this decline are :

- (a) the switch from nitrocellulose products to two-pack products ;
- (b) the improved properties of the paints used by original equipment manufacturers (OEMs) ;
- (c) the improved corrosion resistance of body components ;
- (d) improved application/use on the part of body repair shops.

The turnover of BASF C&I in Glasurit products rose steadily in the period 1982 to 1991 (with the exception of 1986) from £ [...] million to £ [...] million.

- (13) Market shares in motor vehicle refinishing paints in the United Kingdom (excluding commercial vehicles) were as follows in 1991:

ICI	31 %,
Hoechst	30 %,
BASF	16 % (Glasurit : 12 % — RM : 4 %),
Akzo	9 %,
PPG	8 %,
Others	6 %.

According to BASF L + F estimates, the market share of Glasurit motor vehicle refinishing paints in the United Kingdom in the period 1986 to 1991 fluctuated between 6 % (1986) and 9 % (1990).

(ii) *Glasurit products*

- (14) BASF C&I introduced the Glasurit trade name into the United Kingdom in 1972. Although the Glasurit trade name also includes nitrocellulose products, it was primarily intended to fill a market niche for two-pack products. In 1991, Glasurit turnover was broken down as follows (in value terms) : [...] two-pack products ; [...] fillers and primers ; [...] solvents ; [...] synthetic paints ; [...] cellulose/acrylic paints.

Glasurit had a market share of 17,6 % in two-pack paints and a market share of 2 % in nitrocellulose products. The importance of the Glasurit brand name for BASF is clearly reflected in a BASF L + F document dating from 24 September 1990 on the strategy for automotive refinishing paints in the United Kingdom :

'Glasurit GB was the most profitable AR operation of Europe with [...] Mio. DM accumulated BE in the last five years. Sales profitability (BE in % of sales value) was above [...] as an average'.

- (15) Glasurit products are distributed in the United Kingdom at wholesale level through a network of some 200 BASF C&I approved outlets. Some outlets belong to one and the same firm (e.g. 13 in the case of Morelli). In addition, a few (4 to 6) dealers import Glasurit products from other countries.

Glasurit products are distributed in all Member States. In addition to Accinauto for Belgium and Luxembourg, there are also independent exclusive distributors in Denmark and Portugal. In Greece, there is one independent distributor operating without exclusive distribution rights. In the Netherlands, Italy, France, Spain, the United Kingdom, Ireland, Austria, Sweden and Finland, Glasurit products are distributed through BASF subsidiaries. In Germany, BASF L + F has since 1990 had five regional exclusive distributors.

(iii) *Parallel imports of Glasurit products into the United Kingdom — general situation*

- (16) Parallel imports of Glasurit products into the United Kingdom account for the following shares of total Glasurit sales there⁽¹⁾ :

1986	1,38 %,
1987	1,59 %,
1988	2,12 %,
1989	3,49 %,
1990	5,55 %.

- (17) These parallel imports are attributable to the price differential between the United Kingdom and, in particular, Belgium, the Netherlands and Germany. According to an analysis carried out by BASF C&I (see point 19), the price differential between Belgium and the United Kingdom in 1991 amounted to at least 20 % net. BASF L + F documents obtained during the investigation show for the period 1988 to 1989 the average prices for '54 Line' and '21 Line' (two of the main Glasurit two-pack products) in various European countries. In the case of both trade prices and retail prices, the United Kingdom is, as may be seen from the BASF document entitled 'European Price Index', 40 to 70 % above the level in Belgium, the Netherlands or Germany. In the case of 'clear coat' and 'colour clearcoat', the price differences amount to between 20 and 25 %. According to BASF L + F, however, these price differences have since narrowed.

Documents cited by BASF L + F in its reply in the statement of objections show that the selling prices of BASF L + F to BASF C&I (on a DM basis) from 1985 to 1991 for 54 Line paints were consistently higher than the selling prices to Accinauto (a maximum of [...] in 1985 and 1986 and a minimum of [...] in 1990). This was also the case from 1985 to 1989 with 21 Line paints (a maximum of [...] in 1985 and 1986 and a minimum of [...] in 1989).

The net prices to final consumers (in DM) for 21 and 54 Line standard points were also higher in the United Kingdom than the prices in Belgium throughout the period 1985 to 1992.

- (18) According to BASF C&I and BASF L + F, the price differences are attributable to the following : (a) the high level of inflation in the United Kingdom ; (b) the price control arrangements in Belgium (and the effect of Belgian prices on German and Dutch prices) ; (c) the higher service level in the United Kingdom, where the market is still relatively young (body repair shops are more numerous and the manufacturers try to recruit them for their products, which means that competition between manufacturers is also reflected in the technical assistance they provided and in the supply of scales, mixing machines and microfiche viewers).

⁽¹⁾ Calculations based on the BASF C&I document 'GB VLR market share development percentage'.

(19) Documents found on the premises of BASF C&I show that, according to BASF C&I's own assessment:

- parallel imports are among the risks which the Glasurit brand must be prepared for in the United Kingdom,
- BASF C&I granted its dealers additional discounts to help them fight off parallel imports,
- parallel importers primarily target the large body repair shops,
- the price difference between Belgium and the United Kingdom (at least 20 % net) triggered parallel imports (£ 1,5 million a year) and these were probably increased still further with the establishment of the single market in 1993,
- the price level of Glasurit products would in the short term have to adjust to that of competing products in the United Kingdom and in the long term to the price level on the continent, which would mean that prices would have to be cut,
- vertical integration with its own authorized dealers would afford BASF L+F security against parallel imports,
- the largest customers of BASF C&I have complained at the competition caused by parallel imports.

(20) Other documents were found on the premises of BASF L+F (internal memorandums or information from BASF C&I to BASF L+F and letters from British customers of BASF C&I passing on information to BASF L+F).

According to these documents:

- BASF C&I informed BASF L+F on a number of occasions that parallel imports into the United Kingdom were creating problems and that even the largest British dealers were carrying out parallel imports of Glasurit products,
- BASF L+F acknowledges that, because of the large price differentials compared with Belgium and the Netherlands, British firms had specialized in parallel imports, which had resulted in a direct annual loss of approximately £ 1 million and demands for larger discounts from dealers not making use of parallel imports,
- BASF L+F was trying to solve the problem of parallel imports through price increases in Belgium and the Netherlands and through a policy of curbing prices in the United Kingdom,
- BASF C&I informed BASF L+F of purchases made by one of its customers from a parallel importer,

— Morelli, one of the leading distributors in the United Kingdom, also informed BASF L+F of the problems created by parallel imports and of the progress made since May to June 1990 in the efforts to combat parallel imports.

(iv) *Parallel imports of Glasurit products into the United Kingdom by Calbrook and IMF*

(21) Calbrook began importing Glasurit products in 1983. An initial order was placed with a Belgian distributor, but because of the large quantities involved, the order had to be collected from Accinauto. Accinauto tried in vain to block collection of the goods. Calbrook then bought Glasurit products through an intermediary in Germany and two intermediaries in the Netherlands.

(22) IMF began importing Glasurit products from Accinauto in March 1986. When Mr Brooke of IMF contacted Mr Pierre Dudouet of Accinauto, Mr Dudouet telephoned BASF L+F. In its complaint, IMF states that Mr Dudouet said he had to telephone BASF L+F in order to seek its permission to supply IMF. BASF L+F agreed that Mr Dudouet could supply IMF provided that he gave a discount of no more than 19 % of Accinauto's published trade price. Accinauto stated, by contrast, that the purpose of the telephone call was to check that BASF's production could cope with new orders.

(23) In July 1986, Mr Brooke of IMF and Mr Fernie of Calbrook discovered that they were both importing Glasurit products and that IMF was able to obtain certain products, particularly 54 Line paints, from Accinauto at a price that was cheaper than that which Calbrook could obtain from the Netherlands and Germany. On the other hand, Calbrook was able to obtain certain other paints, hardeners, solvents and primers more cheaply in the Netherlands and in Germany.

Calbrook subsequently obtained certain products from Accinauto using orders placed in IMF's name and supplied to IMF other products which Calbrook had purchased in its own name in the Netherlands and Germany.

(24) On 11 July 1989, Accinauto for the first time sent invoices issued in the name of Technipaint for supplies to IMF (order placed on 4 July 1989). The first order from IMF/Calbrook addressed to Technipaint dates from 9 December 1989.

Accinauto has given the following reasons for issuing invoices through Technipaint. In the first place, [a reason relating to internal organization]. Secondly, Accinauto wanted to ensure that the Belgian market was not neglected as a result of the relevant district manager neglecting his Belgian customers in favour of IMF. It had not been possible to separate export business from Belgian turnover before the introduction of the new computerized system (prior to 1990). However,

according to the complainant, Mr Pierre Dudouet, when asked why the name on the invoice had changed, stated that Technipaint was a separate firm which he had established in order to conceal from BASF L+F the fact that Accinauto was supplying customers in the United Kingdom.

- (25) In early March 1990, Mr Brooke of IMF had a meeting with Mr Dudouet during which it was agreed that, in view of IMF's increasing turnover, it would be granted a discount of 25 % (previously 19 %) off Accinauto's published trade price. Business between IMF/Calbrook and Accinauto had grown as follows:

— 17 March 1986 to 31 October 1986:	Bfrs 831 396
— 1 November 1986 to 31 October 1987:	Bfrs 5 935 962
— 1 November 1987 to 31 October 1988:	Bfrs 9 364 824
— 1 November 1988 to 31 October 1989:	Bfrs 6 481 185
— 1 November 1989 to 22 May 1990:	Bfrs 8 975 155.

These sales involved mainly '21 Line' and '54 Line' standard paints, 929-MS hardeners in 2,5 litre canisters and 923-MS clear coat system paints.

The 25 % discount was first applied in March 1990. On 2 April 1990, Accinauto increased the trade price for its products and issued a new price list with the authorization of the Prices Department of the Belgian Ministry for Economic Affairs.

- (26) In their complaint, the complainants state that, in late May 1990, Mr Pierre Dudouet informed Mr Brooke by telephone that BASF L+F had put pressure on him and that consequently he could not supply IMF with Glasurit products any more.

- (27) A handwritten memorandum drafted and signed by Mr Pierre Dudouet in the name of Technipaint was found on the premises of Accinauto. The memorandum states (in translation):

'Impossible to make you a new price offer following tighter controls by BASF to prevent exports to England'.

- (28) During the telephone conversation which took place in late May 1990, it was decided to arrange a meeting at Accinauto's premises between Mr Brooke and Mr Cowell of IMF and Mr Dudouet of Accinauto; this meeting took place on 5 June 1990.

- (29) According to the complainant, Mr Dudouet stated at the meeting that one of BASF C&I's executives, Mr Alan Matthews, had complained to BASF L+F that parallel imports of Glasurit products were losing BASF C&I between £ 1 million and 2

million a year and that such imports had to stop if BASF C&I's sales were to continue to grow. Mr Brooke asked if Mr Dudouet would recommence the supply of Glasurit paints, and Mr Dudouet replied that he would tell BASF L+F of the meeting and inform IMF of BASF L+F's answer by 8 June 1990. Mr Dudouet was then informed that if BASF L+F did not agree, IMF would take legal action. Mr Dudouet then became agitated and said that he had told BASF L+F that he had ceased supplying IMF a year ago. If IMF took action against BASF L+F, it would be apparent that he had lied to them. The meeting then ended.

- (30) Accinauto denies this version of events and maintains that BASF L+F had always been kept informed of the relations between Belgium and IMF.

- (31) On 12 June 1990, IMF sent the following telex to Accinauto:

'As we have not heard from you following our meeting on Tuesday, 5 June 1990, we must now assume that BASF Germany will not allow you to reinstate supplies of Glasurit products to us in the United Kingdom. Therefore we have no alternative but to take legal action against BASF Germany and will be telefaxing them this afternoon asking for the name and address of their lawyers.'

We are sorry this situation has arisen but we must take all steps to protect our business and remain competitive in the market. As you know, the action BASF has taken in directing you to stop our supplies of Glasurit products is in direct contravention of EEC law.'

On the same day, BASF L+F was informed by IMF that Mr Dudouet had told IMF that BASF L+F had directed Mr Dudouet to stop supplying IMF.

- (32) BASF L+F replied to IMF by fax and letter dated 22 June 1990 denying that it had at any time directed Mr Dudouet to stop supplying Glasurit products to any of its customers.

- (33) On 3 July 1990, IMF's lawyers requested Accinauto to confirm that supplies to IMF would be resumed, since BASF L+F had stated that Accinauto had not been obliged to stop supplies. Since Accinauto did not react, IMF informed it by letter dated 27 July 1990 that it intended to withhold payment of the sum due to Technipaint in respect of the invoice for May 1990 until the dispute relating to Accinauto's refusal to supply IMF was settled. However, IMF offered to pay the sum outstanding in trust into a United Kingdom solicitor's account. On 2 August 1990, IMF sent Accinauto a telex reminding it of the letter sent on 27 July 1990. On 30 August 1990, Accinauto's lawyer called on IMF

to settle the most recent invoice plus interest. IMF replied on 1 October 1990 that an offer had been made to settle the amount of the invoice in trust, but that this had not as yet been accepted by Accinauto. In October 1990, Technipaint issued proceedings in Belgium for the recovery of the invoice amount plus damages and interest. By letter dated 21 November 1990, IMF sent Technipaint's lawyers a banker's draft in settlement of the amount of the invoice.

- (34) By fax dated 4 December 1990, IMF ordered a quantity of Glasurit products from Accinauto. When no reply had been received by 12 December 1990, a further fax was sent. By letter dated 26 December 1990, Accinauto refused to supply IMF, citing as the ground for their refusal the fact that IMF delayed payment of the invoice dated 22 May 1990 and had not paid the costs claimed. The letter concludes as follows:

'Following these circumstances and your attitude you will understand that the trust relationship essential for all business is broken. That is why we think it isn't possible to follow our business relations. We can't thus give you a favourable answer to your last requests.'

- (35) Accinauto states that the letters dated 3 and 27 July were drafted after the normal due date of the invoice of 22 May, i.e. 30 June. Because of the persistent delay in payment, Accinauto had taken a decision in principle that the invoices had to be settled by their normal due dates.
- (36) However, it is evident from an Accinauto document that most of the invoices were settled two to seven weeks late. Furthermore, in one particular instance, Accinauto thanked IMF very much for settlement of an invoice two weeks after the due date.

F. The Agreement between BASF L+F and Accinauto on parallel imports of Glasurit products

(i) The exclusive distribution agreement

- (37) The contractual relations between BASF L+F (formerly BASF Farben + Fasern AG, Unternehmensbereich Lackchemie) and Accinauto are governed by an exclusive distribution agreement, with retroactive effect as from 1 January 1981, concluded by the parties on 2 June and 8 October 1982 ('the 1982 agreement'). This agreement was subsequently superseded by a new exclusive distribution agreement, signed by BASF L+F on 14 December 1992 and by Accinauto on 22 January 1993, which entered into force with retroactive effect as from 1 January 1992.
- (38) The clauses of the 1982 agreement of relevance to this Decision are as follows (in translation):

Article 2

Exclusive distribution right and ban on competition

1. (BASF L+F) shall within the contract territory in principle use no other distribution channels for the distribution of the contract products, but shall immediately pass on to the authorized dealer (Accinauto) all inquiries and all information that may promote the sale of the products in the contract territory.
2. The authorized dealer undertakes to pass on to (BASF L+F) any customer inquiries coming from outside the contract territory and to refrain, outside the contract territory, from seeking customers or maintaining branches or supply depots for the distribution of the contract products.

The authorized dealer also undertakes not to sell the contract products either to customers having their registered office outside the EEC or to customers who are known to resell the contract products to the aforementioned category of customers.

(BASF L+F) undertakes to ensure, within the limits of what is legally permissible, that other authorized dealers similarly respect the authorized dealer's contract territory.

....

- (39) The new exclusive distribution agreement of 14 December 1992/22 January 1993 does not contain the reciprocal requirements specified in Article 2 (1) and (2) of the old agreement to pass on inquiries and information.

(ii) Product marking

- (40) In view of the large quantities of parallel imports into the United Kingdom, BASF L+F decided in the period 1985/86 to mark the products sold from Belgium, the Netherlands, Cologne and Suhren/Aachen with a special reference number for each customer so as to find out the channels through which the parallel imports were being effected. The procedure lasted for nine months.
- (41) In a letter dated 5 April 1990 from BASF L+F, reference was made to this decision taken in 1985/86 (in translation):

'... Markings were applied (B, NL, Cologne warehouse and Suhren/Aachen), but the success was virtually zero. These measures were very expensive, and they delayed our delivery times considerably. Even if we had found out the channels through which the products were reaching England, we would not have been able to do anything about it ...'.

(iii) *Authorization given by BASF L+F for parallel exports from Belgium*

- (42) In a memorandum dated 30 August 1989, Mr Augustin (one of the managers responsible for motor vehicle refinishing paints, western Europe) informed Mr Werwie (manager of the BASF L+F department looking after branded paint products) of his talks with Mr Ooms (Accinauto sales manager) on the exports of motor vehicle refinishing paints from Belgium to the United Kingdom and the exploratory contacts between Accinauto and Morelli (which was seeking a business partner for planned exports from Belgium). These exploratory contacts were carried out on the basis of talks between Mr Augustin (BASF L+F) and Mr Ooms (Accinauto).

It was reported amongst other things that (in translation):

'As regards possible supply by Accinauto (assuming that permission is obtained from Glasurit), the following offer was made to Morelli: supply at Belgian market prices minus 25 % dealer discount minus [...] to [...] special discount.'

- (43) An internal BASF L+F memorandum dated 5 June 1990 states the following (in translation):

'For this customer (IMF), Mr Dudouet had at that time received special supply authorization from Mr Kunath. At that time, authorization was given with the idea of allowing a limited volume of supplies from Brussels. Background: no increase in volume by other dealers in Belgium'.

The special authorization to which this memorandum refers was evidently granted in connection with the start of the business relationship between Accinauto and IMF (point 22) in March 1986.

This may be seen from the link between this special authorization granted 'at the time' and the abovementioned reasons and the comments by P. Dudouet of Accinauto in a letter to Mr Augustin of BASF L+F dated 7 June 1989, in which the marking procedure applied in 1985/86 (point 40) is commented on as follows (in translation):

'... In fact, certain customers came to our various sales outlets and ordered 4 x 5 here, then 12 x 5 litres there and other quantities elsewhere, so that they were able to pursue their business and export large quantities throughout Europe.

In view of this trade, we agreed with Glasurit to try to channel and normalize these purchases in order to follow the purchase quantities of our

customers regardless of purchase outside the sales territory.

We thus supply to Ilkeston Motor Factors the following product lines and quantities ...'

- (44) The above letter from Mr Dudouet was written in answer to a query from Mr Augustin, who wished to know what quantities of Glasurit products were leaving Belgium for the United Kingdom. The letter also contained a survey of the purchases made by IMF since 1987 and the purchases made from Herberts (HA Supplies for the firm Morelli) by a wholesaler who obtains the goods from a retailer in Ninove. The letter ends as follows (in translation):

'We would draw your attention to the fact that, if we dismantle this network, we can no longer guarantee to you that our 70 dealers or large body repair businesses will not be tempted or asked to do business with Great Britain and thus considerably disrupt our internal market.

From various talks with the importers, we have been able to learn that the sources of supply are to be sought primarily in the Netherlands and Germany.'

- (45) In a handwritten memorandum dated 9 June 1989, Mr Müller (head of the department responsible for export sales of motor vehicle refinishing paints) makes the following comments to Mr Werwie on Accinauto's reply (in translation):

'We must suppose that Dudouet is telling the truth. He is well aware that he depends on us and will not wish to take any risks.

The quantity is nowhere near Alan's [Matthews — BASF C & I] supposed 100 tonnes. So who is the villain ?

Should we, during our Brussels visit, ask Dudouet, despite the circumstances described by him, to stop exporting ? Augustin and I are going there on 22/23 June. You will be in GB before that, perhaps you could get some more information on the source of supply when you meet the Gt importer [=Glasurit Importer Morelli]'

Mr Werwie answered 'Yes' to the question of stopping exports.

- (46) Mr Augustin and Mr Müller went to Brussels as planned on 22 and 23 June 1989; the report on their trip does not mention any discussion of the question of stopping exports. However, it may be noted that the final invoice issued in the name of Accinauto dates from 30 June 1989, but relates to orders placed on 8 June and that the first order placed by IMF following this visit (order placed on 4 July 1989) corresponded to the first supply invoiced by Technipaint (see point 24).

- (47) In a memorandum dated 30 August 1989, Mr Augustin reported to Mr Werwie on talks which he had had with Mr Ooms (see point 42). The talks concerned the first contacts between Accinauto and Morelli following a conversation between Ooms and Augustin. The memorandum mentions the purchases which Morelli made via HA Supplies from a retailer in Ninove; it states (in translation):

'The late recording of these supplies on the part of Accinauto is due to invoicing under different customer numbers in the case of this dealer.

Smaller amounts of exports through smaller Belgian dealers could also not be ruled out, according to Mr Ooms. This includes supplies by Accinauto to Ilkeston/GB. Such supplies were carried out at the market price [published trade price] minus 15 % discount. Further supply has since then been halted. Mr Dudouet was informed orally on a number of occasions of the planned halting of "black imports". No written information was at any time provided, for obvious reasons'.

- (48) The question of exports from Belgium to the United Kingdom was also discussed during a visit by Mr Werwie and Mr Müller to Accinauto on 14 September. The report drawn up on this visit mentions the efforts made by the firm Morelli to import direct from Belgium.

- (49) In a fax dated 28 March 1990 to Mr Werwie, Mr Lingham (National Sales Manager for Glasurit at BASF C & I) reports that the problem of parallel imports was getting worse and that he had evidence that two authorized dealers were importing from Belgium either direct or through a parallel importer.

- (50) Mr Goecke of BASF L & F added a handwritten comment on this (in translation):

'Following talks with Mü [=Müller], Accinauto has halted exports (11/89). However, cannot influence dealers: Article 85 EC Treaty/see note LMRC → LM/S 30. 1. 90'.

- (51) In a memorandum dated 5 April 1990, Mr Goecke makes the following comments to his boss, Mr Lind, on David Lingham's fax (in translation):

'I am very surprised at this fax, since David Lingham reported on 18. 1. 90 during a visit in Hilstrup [=BASF L + F] that unauthorized imports had decreased considerably. Much has been said and much written on the subject of parallel imports in recent years (all the docu-

ments were destroyed three years ago on the instruction of the legal department).

Under Article 85 of the EC regulation, there is absolute freedom in the purchase of goods.

[There follows the paragraph set out in point 41]. We know that in Belgium Mr Dudouet has exerted moral pressure on his dealers to stop such sales. However, it cannot be said that a total stop has in fact been achieved.'

- (52) On 5 June 1990, the day of the crucial meeting between IMF and Accinauto, Mr Dudouet of Accinauto telephoned Mr Augustin. In a handwritten memorandum to Mr Goecke, here in translation, Mr Augustin wrote (see also point 43):

'Telephone conversation with Mr Dudouet on 5. 6. 1990.

Owner of Ilkeston Motorfactors, Derby, wishes to have further car paint supplies from Accinauto (1989 approx. 10 tonnes). For this customer (IMF), Mr Dudouet had at that time received special supply authorization from Mr Kunath. At that time, authorization was given with the idea of allowing a limited amount of supplies from Brussels. Background: no increase in volume by other dealers in Belgium. If further supplies are not agreed to, legal action is threatened. Ilkeston might possibly wish to set up a branch in Belgium. Objective: export supplies of motor vehicle paint products to Great Britain as from 1. 1. 1993.

At present, apart from Belgium, fairly large quantities are being purchased in the Netherlands and Germany. We do not yet know by whom. If necessary, Mr Dudouet will have the matter investigated via a detective agency.

Mr Dudouet is waiting to hear what the approach should be in future.

Urgent 5/6 Augustin'

- (53) On 21 June 1990, the legal department of BASF L + F informed Accinauto of the telex sent by IMF on 12 June 1990 (point 31). On IMF's assertion that BASF L + F had instructed Accinauto to stop supplying Glasurit products, BASF L + F states the following (in translation):

'... Ilkeston's assertion is wrong. We would like to make the following points clear on this matter:

Under Article 2 (2) of the authorized dealer agreement concluded between us on 2.6 and 8. 12. 1982, you are amongst other things required to refrain, outside the contract territory (Belgium and Luxembourg), from seeking customers or maintaining branches or supply

depots for the distribution of contract products. In addition, under Article 3 (1) of the agreement, you are required to the best of your ability, in compliance with the rules on fair competition, to promote the sale of the contract products in the contract territory.

These obligations are in accordance with the rules of European competition law and are expressly allowed under Article 2 (2) of first Commission Regulation No 1983/83 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements.

Within this framework, however, you reach your decisions on the distribution of the contract products within the contract area alone and at your own discretion. The relations between BASF L + F and Accinauto SA are accordingly exclusively those between seller and purchaser. You are therefore free in your sales decisions. In this context, however, we cannot see that there is any legal obligation on your part to sell to anybody. Should you have any questions on this, we recommend you to seek independent legal advice (...).

- (54) On 11 October 1990, Mr Goecke wrote to Mr Wölker of the legal department (in translation):

'Exports from Belgium to Great Britain

You will recall the conversation with David Lingham (Sales Manager Glasurit UK). Since then, the consignee in England has been withholding Bfrs 999 448 from Accinauto Brussels. Mr Dudouet has never refused to supply Glasurit products to England, but has acted in accordance with our agreement, i.e. supplying provisionally for a further three months.

What legal right does IMF have to withhold settlement of the invoice?'

- (55) A handwritten note by Mr Goecke on this memorandum states (in translation):

'Contractual situation

oral
written
custom

- no pressure from Hi [= Münster Hiltrup = BASF L + F]
- possibly one more final supply.'

- (56) Mr Wölker answered Mr Goecke's enquiry on 26 October 1990 as follows (in translation):

'... the decision whether Accinauto does or does not supply customers in England is entirely Accinauto's business. We assume as before

that L + F has not exerted any influence on Accinauto's decisions in this respect and that such agreements between L + F and Accinauto have not been entered into and should not in future be entered into.'

- (57) However, it is evident from various documents found on the premises of Accinauto and BASF that Accinauto and BASF L + F continued to discuss this dispute between August 1990 and February 1991 (memorandum of 20 August 1990 on Mr Goecke's visit to Accinauto, fax from Accinauto to Mr Goecke of 12 September 1990, letter from Accinauto to BASF L + F of 7 February 1991 and memorandum drafted by Mr Augustin on 12 February 1991).

G. Supply difficulties

- (58) BASF L + F and Accinauto asserted during the proceeding that any talks between them on exports to the United Kingdom had to be seen against the background of the supply difficulties that had existed from 1988 to 1991.

- (59) According to BASF L + F, such supply difficulties involving motor vehicle refinishing paints were due to various factors:

- insufficient stocks as a result of increased demand after 1988,
- a switch in the production of 54 Line standard paints, which began in 1989 and was completed in February 1990,
- reconstruction measures for the filling of SC 29 hardener, which made themselves felt between early 1988 and mid-1989,
- a fire at the raw materials supplier Bayer in February 1989, which created problems mainly for filler and some 21 Line black standard paints.

- (60) It is evident from correspondence and other contacts between Accinauto and BASF L + F that, between the end of 1988 and October 1990, supply difficulties did exist for various products. These may be summarized as follows:

- December 1988 to February 1989: some 94 Line colours were not available, and filler 285-75 was available in only limited quantities,
- February 1989 (fire at the Bayer factory): quota supplies of filler and problems with 21 Line black standard paints,
- June 1989: supply problems with filler and 18, 21 and 54 Line standard paints,
- August 1989: hardener 929-28 not available in 0,5-litre containers,

- September 1989 : in the report on the visit by Mr Werwie and Mr Müller to Accinauto (point 48), it is stated (in translation) that 'product stoppages have lessened, but are often very serious in the case of some products (hardeners). In the case of 21 and 54 Line mixing colours, criticism was expressed of insufficient availability, which was wholly inadequate in the case of some colours',
 - October 1989 : continuing problems with filler and 21 Line black colours (as a result of the Bayer fire), and with 0,5-litre containers in the case of hardener,
 - January 1990 : supply difficulties in the case of filler largely overcome, filling of hardeners in 0,5-litre containers still problematic, supply difficulties with SL 60 polisher and one 54 Line standard paint,
 - February-March-April 1990 : supply problems with 0,5-litre hardener and 54 Line VW paint,
 - as from the end of May 1990 : continuing problems only with 0,5-litre hardener,
 - as from October 1990 : the situation generally reverted to normal.
- (61) The abovementioned supply difficulties also affected supplies by Accinauto to IMF in that, in some cases, slight delays (two to three weeks) were involved for the relevant products. However, these delays did not have any negative impact whatsoever on business relations as a whole. For example, the last IMF order (4 May 1990) supplied Accinauto covered 20 products, six of which were on Accinauto's 'problem list' of 9 May. On 9 and 16 May, IMF inquired of Accinauto when it could expect delivery of the order. On 16 May, Accinauto informed IMF that delivery would take place on 22 May, which did indeed prove to be the case. It should also be pointed out in this respect that BASF L+F replied to the 'problem list' of 9 May only on 25 May. It is evident from the reply that supply difficulties actually existed for only two of the six listed articles.

II. LEGAL ASSESSMENT

A. Access to the file

- (62) BASF L+F asserts that the Commission did not grant it sufficient access to the file, since it was not able to examine the originals of the documents presented.

This objection is not justified. BASF L+F was given access to the file in accordance with the Commission's principles as set out in point 43 of the 18th Report on Competition Policy (1988). There, the Commission stated that 'documents or information can be made accessible to parties to proceedings, either by access to the file or by the sending of copies, according to the circumstances'.

In this instance, the Commission sent, with the statement of objections, copies of all the evidence on which the statement of objections was based (Annexes I to XIX, sent on 19 May 1993). In addition, all the other documents partly or wholly accessible to BASF L+F with the exception of those received by BASF L+F, which were identified as such, were transmitted in the form of copies as an annex, to the statement of objections (documents designated as 'file access' — in the possession of BASF L+F as from 3 June 1993).

The consistency of the transmitted copies with the originals was expressly confirmed to BASF L+F by the Commission's Director-General for Competition. In addition, BASF L+F was asked to have the completeness of the list of documents which were partly or entirely accessible to it confirmed by the Commission's Hearing Officer. BASF L+F did not take up this offer.

B. Article 85 (1)

(i) Undertakings

- (63) BASF L+F and Accinauto are undertakings within the meaning of Article 85 (1) of the EC Treaty.

(ii) Content of the agreement

- (64) The exclusive distribution agreement (1982 agreement) concluded in June/October 1982 between BASF L+F and Accinauto with retroactive effect as from 1 January 1981 is an agreement within the meaning of Article 85 (1) of the EC Treaty.
- (65) Article 2 of the 1982 agreement sets out the rights and duties of the parties with regard to exclusive distribution. Accinauto undertakes, in the first subparagraph of Article 2 (2), to 'pass on' to BASF L+F any customer inquiries coming from outside the contract territory (Belgium and Luxembourg).

- (66) The phrase 'pass on customer inquiries' must be understood to mean that the party to whom the inquiries are 'passed on' takes the place of the party doing the 'passing on'.

- (67) This meaning of the term 'pass on' is also made clear by the systematic link between the obligation incumbent on Accinauto pursuant to Article 2 (2) and the obligation incumbent on BASF L+F pursuant to Article 2 (1). Article 2 (1) stipulates that BASF L+F will immediately 'pass on' to the authorized dealer all inquiries and information which are likely to promote the sale of the products in the contract territory. This means that BASF L+F passes on to Accinauto orders or names of potential customers from the contract territory so as to allow supply by Accinauto to take place. However, Accinauto remains free not to carry out the supply under certain circumstances (for example, after checking the creditworthiness of customers). Accinauto confirmed at the hearing that Article 2 (1) of the agreement is to be understood in this way.

The same must accordingly apply to Accinauto's obligation pursuant to Article 2 (2). The obligation incumbent on Accinauto thus means that it is not Accinauto but BASF L+F which decides on the supply of such customers, that is to say, whether and under what conditions Accinauto, BASF L+F or a third party may accept orders coming from outside Belgium and Luxembourg.

This interpretation was indirectly confirmed by BASF L+F. At the hearing, it stated the following on the interpretation of the agreement (in translation): 'The ... [exclusivity agreement] obliges BASF to supply only goods for Belgium exclusively through Accinauto. It does not, however, oblige BASF to provide in addition, for the supply of other markets, goods which are not yet at the disposal of Accinauto.' It follows from the above that Accinauto is prohibited from deciding independently on supplying customers based outside the contract territory.

- (68) The parties assert, however, that the first subparagraph of Article 2 (2) of the 1982 agreement imposes on Accinauto only a duty to pass on information and does not involve any further obligations that go beyond that. Such information is intended to allow BASF L+F to monitor its supply capacities.

This argument is contradicted by the fact that such an obligation would apply only in the case of customers from outside the contract territory. It is not clear for what reasons the origin of a customer could have a bearing on capacity problems. If the parties' argument were taken to its logical conclusion, there would necessarily have to be a requirement to check all customers inquiries. For the rest, the place where the customer places his order (United Kingdom or Belgium) is irrelevant to ques-

tions involving production capacity. At most, it is important for production purposes to know whether demand exists but not where it originates, that is, which country it comes from.

Lastly, Article 2 is entitled 'Ban on competition' and not, for example, 'Supply capacity', which also tells against any interpretation of this clause along the lines put forward by the parties.

- (69) In addition, the parties have asserted that Article 2 (2) provides for an exchange of information as to the extent of exports by Accinauto. Such an exchange of information, it is claimed, is necessary for reasons of the sales strategy of BASF L+F.

Sales-strategy reasons such as the calculation of national market shares and the allocation of advertising budgets between national distributors do not, however, require any information exchange between a manufacturer and its exclusive distributor prior to each individual delivery and certainly do not necessitate any agreement between a manufacturer and its exclusive distributor on the transfer to the manufacturer of responsibility for unsolicited sales (passive sales) to customers outside the contract territory.

- (70) BASF L+F also claims that the exchange of information on individual orders is necessary in order to establish why customers wish to purchase outside their proper territory. This, it is argued, can provide useful evidence of problems or shortcomings in the distribution network.

Here again, it must be pointed out that it is not necessary for this purpose to have information prior to each supply.

(iii) *Implementation of the agreement*

- (71) The interpretation of Article 2 set out in point 67 is confirmed by the manner in which the parties have consistently applied this Article. Accinauto acknowledges that it telephoned BASF L+F when IMF first approached it (in March 1986) to obtain supplies (see point 22). Furthermore, it is clearly evident from the BASF L+F document of 5 June 1990 (see point 43) that Mr Dudouet had obtained 'special authorization' to commence supplies. The use of the term 'special authorization' and the reasons given for issuing such authorization ('at that time, authorization was given with the idea of allowing a limited amount of supplies from Brussels. Background: no increase in volume by other dealers in Belgium') and the letter which Mr P. Dudouet sent Mr Augustin on 7 June 1989 (agreement with BASF L+F to 'channel and normalize'

purchases by parallel exporters) confirm that BASF L+F (which in 1985 and 1986 had already taken measures against parallel exports — see points 40 and 41) had reserved for itself the right to decide on the treatment of customer inquiries coming from outside the contract territory. It is also clear from this that there had to be special reasons for authorizing such supplies.

or to carry out any more supplies, Accinauto finally complied with the decisions taken by BASF L+F on exports to other Member States and thus with the 82 agreement.

This halting of supplies was preceded, at the end of May 1990, by a telephone conversation between the complainant and Mr Dudouet in which, according to the complainant, Mr Dudouet stated that he could no longer supply IMF, because BASF L+F was putting pressure on him. This assertion seems to be confirmed by an undated, handwritten note, found on Accinauto's premises, which states (in translation): 'Impossible to make you a new price offer following tighter controls by BASF to prevent exports to England' (point 27). It must also be noted that, at the end of March 1990, BASF C&I informed BASF L+F that the problem of parallel imports was getting worse and that it had evidence of a Belgian source of supply (point 49), which explains the tightening of controls by BASF L+F.

(72) It is evident from the memorandum of 30 August 1989 (see point 42) that 'IMF' is not an isolated case. In the case of supplies to Morelli, Accinauto also obtained the authorization of Glasurit (namely BASF L+F) on the intended price conditions.

(73) The handwritten memorandum of 9 June 1989 (point 45) shows that BASF L+F not only gave Accinauto the authorization to enter into business relations with dealers who were exporting Glasurit products to other Member States, but had also reserved to itself the right to intervene in such authorized business relations. In this memorandum, Mr Werwie (responsible for the Glasurit brand at BASF L+F) instructs Mr Müller and Mr Augustin to request Accinauto, during their visit to it on 22 and 23 June 1989, no longer to export and hence to stop the exports originally authorized by BASF L+F. From the BASF L+F memorandums of 30 August 1989 (point 47) and of 29 March 1990 (points 49 and 50), it emerges that, according to BASF L+F, Accinauto stopped its supplies to IMF and to the other British customers. In addition, it is explicitly stated in the memorandum of 30 August 1989 that Mr Dudouet had repeatedly been informed orally of 'the planned halting of black imports'. This shows clearly that the decision to stop parallel exports to the United Kingdom was taken by BASF L+F.

(74) The fact that, in the period from July 1989 to the end of May 1990, Accinauto disregarded this ban on further supplies to IMF does not invalidate the above findings. As from July 1989, Accinauto invoiced the sales to IMF through Technipaint. This demonstrates that Accinauto felt obliged to keep the continuing supplies to the United Kingdom secret from BASF L+F. In the complaint, the complainant, referring to the statement made by Mr Dudouet on 5 June 1990, asserted that Mr Dudouet had informed BASF L+F as long ago as one year previously of the cessation of supplies to IMF. The complainant's assertion is confirmed by the documents cited in points 45, 47 and 50. The fact that the meeting held on 22 and 23 June coincided with the switch to the issuing of invoices by Technipaint also points in this direction (point 46).

(75) At the end of May 1990, Accinauto stopped supplies through Technipaint. With its statement that it was no longer able to make any price offers

(76) Following the halting of supplies to IMF at the end of May 1990, Accinauto complied unreservedly with the 1982 agreement. In June 1990, Accinauto informed BASF L+F that IMF was insisting on receiving supplies and that Accinauto was 'waiting to hear what the approach should be in future' (point 52). The handwritten note by Mr Geocke: 'Possibly one more final supply' (point 55) and the sentence in the letter to Mr Wölker: 'Mr Dudouet has acted in accordance with our agreement, i.e. supplying provisionally for a further three months' (point 54) confirm the continued implementation of Article 2 of the 1982 agreement.

(77) The arguments put forward by BASF L+F and Accinauto against the conclusions which the Commission draws from the above-mentioned documents may be summarized as follows:

(78) Accinauto states that it telephoned BASF L+F when first contacted by IMF and got in touch with BASF L+F before supplying Morelli because it wanted to make sure that BASF L+F could, in terms of production, satisfy these new inquiries.

The first order placed by IMF in March 1986 amounted to Bfrs 67 480. Since the parties have never asserted that there were any supply problems in 1986 and since Accinauto's total turnover in Glasurit products comes to over Bfrs 500 million and that of BASF L+F many times that amount, it is not plausible that an order of this size could ever give rise to any supply problems. In the case of Morelli too, the explanation put forward by Accinauto cannot be accepted, since Morelli did not at the time specify any supply quantities at all (only product categories were referred to).

- (79) Accinauto also points to the fact it still supplies various other British customers. It claims that this shows it does not need any consent or authorization to supply parallel importers from other Member States.

However, Accinauto specifies only two customers in this respect. One of these customers exports the goods obtained from Accinauto to third countries (Africa). The other customer specified by Accinauto is supplied not by Accinauto, but by a retailer in Ninove (point 44). With regard to such supplies, Accinauto reported the following to BASF L+F: 'The late recording of these supplies on the part of Accinauto is due to invoicing under different customer numbers in the case of this dealer' (point 47). It must be inferred from this that Accinauto also informed BASF L+F regarding the customer of its client in Ninove.

BASF L+F indicated two further business relationships which Accinauto has with firms outside the contract territory. This is not relevant, since the business relations began only in 1993, i.e. at a time when the 1982 agreement was already terminated, and because these customers, contrary to the assertion made by BASF L+F, are established in the contract territory, namely in Antwerp and Luxembourg.

- (80) The reason given by Accinauto for the issuing of invoices through Technipaint, namely [the reason relating to internal organization] (point 24), is similarly not plausible.

In the first place, it is scarcely conceivable that, in order to [achieve the limited goal of internal reorganization], Accinauto would wish to incur the expenditure inevitably involved in a changeover in invoicing. In the second place, IMF was the only [...] customer treated in this way, although in June 1991 [other customers were in a comparable *de facto* situation].

Accinauto denies that the firm Technipaint was established in order to conceal parallel exports to the United Kingdom. It points out that the firm had existed since 1982 in order to provide technical assistance for users of motor vehicle refinishing paints. The Commission does not doubt this. However, the fact that the invoicing of car paint sales did not form part of the original business activity of this firm and that only one customer was invoiced in this way indicates that the real purpose of the changeover in invoicing was to conceal the business done with IMF.

- (81) Against the conclusion which the Commission draws from the undated handwritten note 'Impos-

sible to make you a new price offer following tighter controls by BASF in order to prevent exports to England' (point 75), Accinauto argues that this note reflects a telephone conversation with IMF in December 1989 in which it informed IMF of the production difficulties at BASF L+F and in particular of the disruption to supply caused by the raw materials shortage. Accinauto claims that it was pointing out to IMF in this context that no more supplies could be guaranteed and no more price offers made.

This explanation, too, is implausible. The note in question does not contain any reference whatsoever to any production difficulty at BASF L+F. It is improbable that there can be any connection between 'tighter controls by BASF to prevent exports to England' and the alleged production difficulties.

Furthermore, the date specified by Accinauto (December 1989) is not plausible. In March 1990, Accinauto made a new price offer to IMF (discount of 25 %) and in April 1990 informed IMF of its new prices (point 25). Such offers within the framework of a business relationship covering several years are inconsistent with the alleged impossibility in December of making a new price offer.

The question of the context of this note can ultimately be left aside; even if the note had been drafted in December 1989, it would confirm the interpretation which the Commission has given to the implementation of the 1982 agreement.

- (82) Accinauto further asserts that its decision to terminate supplies to IMF was not based on any instructions received from BASF L+F. The reason for terminating the supplies, it claims, was that IMF had since August 1989 not been paying its bills on time. Such behaviour on the part of IMF had supposedly destroyed the relationship of trust that was necessary for any durable business relationship. This fact, together with the need to concentrate on the domestic market, had prompted Accinauto to break off business relations with IMF.

The justification put forward by Accinauto for stopping supplies to IMF does not stand up. It is true that IMF frequently paid its bills after the due date, as may be seen from an Accinauto listing. However, Accinauto never complained to IMF about the late payment of bills or requested more punctual payment. Rather, IMF continued to receive supplies as normal for almost one more year. It is not therefore plausible that the sudden halt in supplies in May to June 1990 could have had anything to do with IMF's conduct as to payment. Only on 30 August, that is, after the talks between IMF and

Accinauto on 5 June (points 28 to 29) and at a time when the relations between the two parties had already developed into a dispute, did Accinauto first complain about IMF's payment behaviour (point 33).

- (83) Lastly, BASF L+F and Accinauto indicate that the implementation of the 1982 agreement was attributable to supply bottlenecks at BASF L+F. In the period 1988 to 1991, it is argued, BASF L+F had supply difficulties stemming from a combination of various factors (see points 58 to 60). The firm was therefore concerned about supplying the Belgian market.

The requirement that Accinauto inform BASF L+F about exports was never taken particularly seriously, it is claimed. Only when supply difficulties occurred did BASF L+F pay closer attention to Accinauto's exports to the United Kingdom. The background to this was solely the legitimate concern to ensure steady supplies to the Belgian market. Ensuring steady supplies for customers was particularly important in the case of motor vehicle refinishing paints, since there was otherwise a danger of losing customers. Since the sale of motor vehicle refinishing paints was a cost-intensive and service-intensive business, (body shops had to be provided free of charge with expensive mixing equipment), each manufacturer had a particular interest in doing everything possible to avoid losing customers.

- (84) In response to this submission, it should be pointed out that only some of the articles purchased by IMF were affected by supply difficulties. Such supply difficulties resulted only in slight delays in delivery by Accinauto, delays which IMF accepted without further ado (point 61).

- (85) In general, the Commission takes the view that it is certainly legitimate to impose an obligation on an authorized dealer 'to the best of his ability (...) to promote the sale of the contract products in the contract territory and to take all measures to achieve a turnover corresponding to the population and other economic circumstances of the contract territory' (translation of Article 3 of the 1982 agreement). The measures specified, namely:

- establishment of a distribution organization covering the entire contract territory,
- establishment of appropriately equipped business premises,
- provision of advice for customers by properly trained staff,
- maintenance of an appropriate stock of goods,
- distribution of information material made available,

correspond to the 'measures for promotion of sales' referred to in Article 2 (3) (c) of Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the

application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements⁽¹⁾, as last amended by the Act of Accession of Austria, Finland and Sweden.

- (86) However, such obligations on the part of the exclusive distributor do not give the supplier the right to decide how the exclusive distributor shall behave with regard to any given customer. This applies in particular in the case of supply difficulties. Even in such cases, the supplier is not allowed to agree with the exclusive distributor a ban on passive sales.

Customers with the contract territory may be given priority only within narrow limits: the authorized dealer may only be prohibited from engaging in active sales outside the contract territory in order to ensure that he concentrates his sales efforts on the contract territory. However, he must remain free to engage in passive sales (see recital 11 of the preamble to Regulation (EEC) No 1983/83). In the present instance, only passive sales are involved.

(iv) *Restriction of competition*

- (87) The relevant product market in this instance is the market for motor vehicle refinishing paints, which comprises both 'new technology' two-pack paints and 'old technology' products (nitrocellulose paints and synthetic acrylic paints). 'Old' and 'new' technology paints serve the same purpose, namely the refinishing of damaged paintwork, which can occur on vehicles for various reasons (see point 9). Indeed, the increasing displacement of the 'old' technology by the 'new' shows that the products are in principle interchangeable.

- (88) Paints for new vehicles are, by contrast, not to be included in the relevant market, even though they have the same composition and, according to BASF L+F, are manufactured on the same production lines. They are intended for other customers (motor vehicle manufacturers rather than body repair shops) and are distributed in entirely different packaging and quantities.

- (89) The arrangement between Accinauto and BASF L+F specified in Article 2 (2) of the 1982 agreement whereby Accinauto is required 'to pass on to BASF L+F any customer inquiries coming from outside the contract territory' restricts Accinauto's freedom of contract to supply customers from other Member States of the Community. This has the object and effect of restricting competition between Accinauto and other suppliers of Glasurit motor vehicle refinishing paints, and in particular between Accinauto and BASF C&I. Furthermore, this restriction of intra-band competition affects

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 1.

inter-brand competition on the United Kingdom market for motor vehicle refinishing paints. Parallel imports from low-price Member States can increase price competition in the importing country and thus influence the level of prices there.

- (90) The objective conditions of competition in the case of the relevant product differ substantially in the United Kingdom from those in other areas of the European Union (see above, Part I.E). As a result of the 1982 agreement, this substantial part of the common market is protected against intra-brand competition in Glasurit motor vehicle refinishing paints.

(v) *Restriction on trade between Member States*

- (91) The agreement between BASF L + F and Accinauto is liable to affect trade between Member States by restricting parallel exports of Glasurit products from Belgium to the United Kingdom. Community markets lying outside Accinauto's contract territory, and in particular the United Kingdom market, are protected against intra-brand competition in Glasurit motor vehicle refinishing paints. The agreement has the effect of artificially partitioning national markets within the Community. The establishment of a common market, which is one of the fundamental objectives of the Treaty, is impeded.

(vi) *Appreciability*

- (92) During the period under investigation (see below), Glasurit motor vehicle refinishing paints (see points 13 to 15) held an important position on the United Kingdom market for motor vehicle refinishing paints (a market share of between 6 and 9 % from 1986 to 1991, and turnover of £ [...] million in 1991). In addition, there were considerable price differences for Glasurit products (at times up to 40 to 70 %) between Belgium and the United Kingdom, in the case of both trade prices and retail prices (see point 17).

In view of these two factors (the market position of the brand and the prevailing price differences), the United Kingdom market provided all the preconditions for the development of substantial parallel import activity. The purchases made by the two complainant firms are evidence of the scale of potential demand for Glasurit products in the United Kingdom.

The 1982 agreement, which restricts the scope for parallel trade between Belgium and the United

Kingdom, appreciably restricts competition and trade between Member States.

- (93) BASF L + F considers that the 1982 agreement did not have any appreciable effects. It points out that :

- only the supply of goods to meet IMF's order of 4 December 1990 (point 34) was actually impeded,
- the quantities purchased from Accinauto represented only about 10 % of all Glasurit parallel imports into the United Kingdom,
- in addition to Accinauto, dealers in other Member States were possible sources of supply for parallel imports into the United Kingdom, with one such dealer known to have supplied about three times the amounts provided by Accinauto for import into the United Kingdom.

These objections do not stand up. In the first place, it is not the quantity of the supplies carried out despite the agreement that matters, but the potential scope for supply that objectively existed and was prevented by the agreement. As noted above (point 92), the objective scope for supplies by Accinauto was by no means exhausted by the quantities actually supplied to IMF and Calbrook. The very existence of such an agreement designed to prevent parallel imports restrains the exclusive distributor from entering into business relations with parallel importers. Secondly, the 1982 agreement was in force from 1 January 1981 until 31 December 1991 and was implemented by the parties at least from March 1986. The agreement thus produced effects during a period that was sufficient for the development of substantial trade relations.

In addition, BASF L + F has not shown that, during the investigation period, other sources of supply represented sources that were objectively equivalent to Accinauto and that, had this condition been fulfilled, the relevant parallel importers who could potentially have purchased from Accinauto had available the necessary information to regard such other sources of supply as equivalent.

It is evident from the complainants' account (point 23) that IMF was able to obtain certain products, particularly 54 Line paints, more cheaply from Accinauto than Calbrook could in the Netherlands and in Germany. There is thus proof for these products at least that dealers in the two abovementioned countries, to which BASF L + F referred in the reply to the statement of objections, did not represent a source of supply equivalent to Accinauto.

- (94) BASF L + F also states that the higher prices on the United Kingdom market were due to higher costs and that the price differences between Belgium and the United Kingdom have in the meantime become so small as to have almost disappeared. It must be stated on this point that the reasons for the price differences are irrelevant; BASF L + F is not accused of having asked for excessively high prices on the United Kingdom market. Similarly, the narrowing of price differences is irrelevant here to the assessment under competition law, since during the investigation period price differences existed which represented an incentive for parallel imports into the United Kingdom.

(vii) *Conclusion*

- (95) The 1982 agreement is consequently caught by the prohibition laid down in Article 85 (1) of the EC Treaty.

C. Article 85 (3)

(i) *Block exemption pursuant to Regulation (EEC) No 1983/83*

- (96) Regulation (EEC) No 1983/83 grants exclusive distribution agreements, subject to certain conditions, a block exemption from the prohibition laid down in Article 85 (1). Exclusive distribution agreements lead in general to an improvement in the distribution of goods, because the manufacturer is able to concentrate its sales activities. They also lead to intensive marketing and to continuity of supplies while at the same time rationalizing distribution (recitals 5 and 6 of Regulation (EEC) No 1983/83). However, consumers can be assured of a fair share of the benefits resulting from rationalization only if parallel imports remain possible (recital 11 of Regulation (EEC) No 1983/83).
- (97) By restricting Accinauto's right to engage in passive (i.e. unsolicited) sales to customers outside its contract territory, the 1982 agreement imposes on the exclusive distributor a restriction on competition that goes beyond the obligation, exempted pursuant to Article 2 (2) (3) of Regulation (EEC) No 1983/83, 'to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot'. The 1982 agreement is thus not eligible for the exemption provided for in Regulation (EEC) No 1983/83.

The restriction of Accinauto's right to engage in passive sales to customers outside the contract territory also makes it difficult for such customers/intermediaries to obtain Glasurit products from Accinauto. Pursuant to Article 3 (d) of Regulation (EEC) No 1983/83, this restriction precludes application of the Regulation.

(ii) *Individual exemption*

- (98) The 1982 agreement between BASF L + F and Accinauto was not notified to the Commission and is not exempt from the notification requirement, since it relates to imports and exports between Member States (see Article 4 (2) (1) of Regulation No 17). For this reason alone, individual exemption cannot be granted.
- (99) Even if the agreement had been notified, it could not have been exempted. It has consistently been the Commission's position, repeatedly upheld by the Court of Justice⁽¹⁾, that an agreement which precludes parallel imports cannot be exempted pursuant to Article 85 (3)⁽²⁾. Consumers will be assured a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible (recital 11 of Regulation (EEC) No 1983/83).

Even if the 1982 agreement did lead to an improvement in the distribution of goods and consumers were assured a fair share of the resulting benefit, it could not be assumed that the prevention of parallel trade would be indispensable to the attainment of those objectives. The benefits of an exclusive distribution agreement are achieved by allowing the dealer to concentrate on his contract territory. The ban on active sales outside the contract territory is sufficient for this purpose. To impose in addition a ban on passive sales outside the contract territory is unnecessary, since passive sales do not involve particular sales or advertising efforts and thus do not prevent the dealer from concentrating his sales efforts on his contract territory.

Two of the four exemption conditions are thus not met. Consequently, there are also substantive reasons for ruling out an individual exemption.

D. Article 3 (1) of Regulation No 17

- (100) Article 3 (1) of Regulation No 17 provides that, where the Commission finds that there is infringement of Article 85 of the Treaty, it may by decision require the undertakings concerned to bring such infringement to an end. According to the information available to the Commission, BASF L + F and Accinauto have now ended the infringement by concluding a new distribution agreement that no longer contains the contested clause requiring

⁽¹⁾ See, for example, judgments in Case 86/82 Hasselblad v. Commission [1984] ECR, p. 883; and in Case C-279/87 Tipp-Ex v. Commission [1990] ECR, p. I-261.

⁽²⁾ See also Commission Decision 88/172/EEC (Konica), OJ No L 78, 23. 3. 1988, p. 34).

Accinauto to pass on to BASF L+F any customer inquiries not originating within the contract territory. The new agreement entered into force with retroactive effect as from 1 January 1992. Although it was signed only on 14 December 1992 and 22 January 1993, the Commission is assuming that the undertakings concerned ended the infringement on the date on which the agreement entered into force.

- (101) At the hearing, BASF L+F asserted that the letter of 21 June 1990 (point 53) should be regarded as marking the ending of the infringement.

This objection does not stand up to scrutiny. The abovementioned letter assumes that Accinauto was not at any time subject to restrictions on disposal as regards sales to parallel importers. However, as was shown above, this is not the case. From Accinauto's point of view, this letter is not unequivocal and thus not appropriate for bringing about a change in the contractual arrangements. On the contrary, the letter confirms the arrangement provided for in the 1982 agreement, which is merely interpreted in a way which was obviously never its object.

E. Fines

- (102) Pursuant to Article 15 (2) (a) of Regulation No 17, the Commission may impose fines on undertakings where, either intentionally or negligently, they infringe Article 85 (1). In fixing the amount of the fine, the Commission is required to take account of the gravity and duration of the infringement.

- (103) The Commission considers that fines should be imposed on BASF L+F and Accinauto for the following reasons:

1. the ban on passive sales conflicts with the objective of establishing a common market, enshrined as a basic principle in the Treaty, and must therefore be regarded as being of particular gravity;
2. Community law is clear on this point⁽¹⁾;
3. in the 19th Report on Competition Policy (1989), with reference to the 'AKZO Coatings' case, the Commission made clear its administrative practice with regard to agreements that are broadly similar to the 1982 agreement both in terms of products (motor vehicle refinishing paints) and in terms of the market concerned;

4. BASF L+F is an important undertaking with a strong position on the motor vehicle refinishing paints market in Europe. Its conduct thus has significant economic impact;

5. the infringement began on 8 October 1982, the date of the final signature to the 1982 agreement, and lasted until 31 December 1991. It is proven that the subject-matter of the agreement that is of relevance to this case was implemented as from March 1986;

6. BASF L+F and Accinauto committed the infringement intentionally. According to settled case-law⁽²⁾, it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the EC Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition.

In view of the clear legal position regarding the ban on passive sales, BASF L+F and Accinauto could not have been in any doubt as to the anti-competitive effects of the 1982 agreement.

Moreover, BASF L+F was indeed aware of the infringement of the competition rules. This is clear from the documents, which show that BASF L+F knew that its conduct contravened Article 85 (1) of the EC Treaty. In the memorandum dated 30 August 1989 (point 47), it is stated: 'No written information (on the planned halting of unauthorized imports) was at any time provided, for obvious reasons'. 'For obvious reasons' suggests that BASF L+F knew that such an agreement infringed Article 85. This view is confirmed by the comment in the memorandum of 5 April 1990: 'Much has been said and much written on the subject of parallel imports in recent years (all the documents were destroyed three years ago on the instruction of the legal department). Pursuant to Article 85 of the EC regulation, there is absolute freedom in the purchase of goods' (point 51);

7. the economic significance of the matter emerges more clearly from the following data available to the Commission, which provide an idea of the benefits which the parties derived from their conduct in breach of the Treaty:

⁽¹⁾ See the settled case-law of the Court of Justice, from Joined Cases 56 and 58/64 *Consten-Grundig v. Commission* [1966] ECR, p. 299 to Case C-279/87 *Tipp-Ex v. Commission* cited above.

⁽²⁾ See judgments in Case 246/86 *Belasco and others v. Commission* [1989] ECR, p. 2117 and Case 19/77 *Miller v. Commission* [1978] ECR, p. 131.

- sales of Glasurit motor vehicle refinishing paints in the United Kingdom are the BASF group's most profitable motor vehicle refinishing paint business in Europe with total profits of DM [...] million for the period 1985 to 1989 and with an average profit margin of more than [...] on sales,
- the turnover of BASF C&I in Glasurit products was £ [...] million in 1991 out of a total BASF C&I turnover of £ 80,3 million,
- the price difference between the United Kingdom and Belgium both in retail prices and in trade prices was 40 to 70 % for 21 and 54 Line paints and 20 to 25 % for clear coats and colour clear coats.

(104) The Commission takes into account, on behalf of the undertakings concerned, the fact that the infringement was terminated before notification of the statement of objections.

(105) In fixing the amount of the fine imposed on Accinauto, the Commission has also taken account of the fact that Accinauto is economically dependent on BASF L+F and that this dependence was used by BASF L+F to enforce its economic interests (see point 45),

HAS ADOPTED THIS DECISION :

Article 1

The agreement between BASF Lacke + Farben AG and Accinauto SA, under which Accinauto SA was required, from 8 October 1982 to 31 December 1991, to pass on to BASF Lacke + Farben any customer inquiries coming from outside the contract territory, infringed Article 85 (1) of the EC Treaty.

Article 2

1. The following fines are hereby imposed on the undertakings concerned for having participated in the infringement referred to in Article 1 :

- BASF Lacke + Farben AG, a fine of ECU 2 700 000,
- Accinauto SA, a fine of ECU 10 000.

2. The fines referred to in paragraph 1 shall be paid, in ecus, within three months of notification of this Decision. The amount shall be transferred in ecus to the account of the Commission of the European Communities No 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, 5 Rond Point Schumann, B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 9,50 %.

Article 3

This Decision is addressed to :

1. BASF Lacke + Farben AG
Glasuritstraße 1
D-48165 Münster-Hiltrup ;
2. Accinauto SA
Quai des Charbonnages 76
B-1080 Brussels.

This Decision shall be enforceable in accordance with Article 192 of the EC Treaty.

Done at Brussels, 12 July 1995.

For the Commission

Karel VAN MIERT

Member of the Commission